No. 23-719

IN THE

Supreme Court of the United States

DONALD J. TRUMP,

Petitioner,

v.

NORMA ANDERSON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF COLORADO

BRIEF FOR DAVID B. TATGE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

David B. Tatge, a member of the Virginia and District of Columbia bars, respectfully submits this *Amicus Brief* to the Court in support of the Anderson Respondents in President Trump's appeal from the ruling in *Anderson v. Griswold,* ___ P.3d ___, 2023 CO 63, 2023 WL 8770011 (Dec. 19, 2023) (hereinafter "*Anderson*"), which *aff'd in part and rev'd in part Anderson v. Griswold*, Case 23 CV3257 (Dist. Ct. for City and County of Denver CO, Nov. 17, 2023).

Mr. Tatge practices law as the sole member of David B. Tatge, PLLC in Oak Hill, VA.[1] *Amicus* has a significant interest in American law and American history with particular interest, as to the latter, in the Civil War here between 1861-1865, aka The War Between the States.

Mr. Tatge bring to the Court's attention cases, laws and arguments relevant to President Trump's appeal of the Colorado Supreme Court's decision in *Anderson* which were either not cited below or which received less attention than is warranted.

SUMMARY OF ARGUMENT

This Court should uphold the decision of the Colorado Supreme Court in *Anderson* for many reasons.

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1. Pursuant to Sup. Ct. R. 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *Amicus* himself made a monetary contribution towards its preparation or submission.

Section 3 of the Fourteenth Amendment to the Constitution is self-executing. This is shown by its plain words and meaning.

This is also established by the ruling to this effect made in *Case of Davis*, 7 F. Cas. 63 (C.C.D. Va. decided Dec. 5, 1868, reported 1871), by Chief Justice Chase of the Supreme Court, sitting as a judge of the federal circuit court. There, co-presiding over the treason trial of Jefferson Davis, former president of the Confederate States of America, his ruling, in a split decision appealed to this Court and then mooted, that Section 3 is self-executing, in the sense of being enforceable without implementing legislation from Congress, respected its "plain words" and meaning.

The next year, in *In re Griffin,* 11 F. Cas. 7 (C.C.D. Va. 1869), aka "*Griffin's Case*," Chief Justice Chase, again sitting as a circuit judge in the same court, flip-flopped. Now, just a few months later, he ruled that Section 3 of the Fourteenth Amendment is *not* self-executing and requires prior Congressional action to implement it. Which legal result at odds with the plain language of Section 3. This is the same position which President Trump now takes here. In deciding *Griffin's Case*, Chief Justice Chase did not cite, let alone distinguish, his earlier ruling to the contrary in *Case of Davis*. The Chief Justice, in so ruling in *Griffin's Case*, applied "judicial gloss" by adding and then applying words not found in, and posing questions not asked by, the plain text of Section 3.

Nothing in the language of Section 5 of the Fourteenth Amendment, contrary to the ruling in *Griffin's Case*, says that "only" Congress can enforce Section 3. Likewise,

Section 5 does not say Congress has "the" power, alone, to enforce Section 3 of the Fourteenth Amendment. Nor that a state cannot, in connection with applicable state election laws, like the Anderson Respondents and the Colorado courts used below, enforce it. Contrary to the position of President Trump here.

Indeed, less than 50 years ago Congress applied Section 3 of Article XIV directly itself, *without* any implementing federal enforcement legislation. This happened when Jefferson Davis had his rights to hold office and all other rights posthumously returned to him by a 2/3 vote of both Houses of Congress then signed into law by President Carter. P.L. 95-466 (Oct. 17, 1978).

Since the time the Fourteenth Amendment became law on July 9, 1868 several states, including, for example, Colorado, Georgia, New Mexico and North Carolina, have applied their own state law voting statutes, in connection with Section 3 of Article XIV, to properly bar from office culpable persons who took oaths to support the Constitution of the United States and then violated those oaths. Or, if they were already in office when such violations occurred, to properly force their resignation.

These somewhat abbreviated state law election proceedings are not necessarily a "slam dunk" against the subject defendant. This is shown by a recent Georgia case where voter efforts there to bar U.S. Rep. Marjorie Taylor Greene from running for re-election failed, at both the Secretary of State level (who adopted the proposed findings and legal conclusions of an administrative law judge) and on the voters' appeal, in state court.

To help the voting public in America maintain public trust in our judicial system, *Amicus* urges that the the sort of policy questions posed (and answered) by the overly judicially-active Chief Justice Chase in *Griffin's Case*, in ruling that Section 3 of Article Fourteen is not self-executing, a holding inconsistent with the plain words and meanings of its text, are best left to legislators answerable to the voting public. Judges with life-time (or very long) tenure who are not answerable to the voting public directly should stick to calling balls and strikes, letting the chips fall where they may.

This Court has previously held that the Fourteenth Amendment is self-executing. It should not now carve-out a different rule for Section 3 thereof.

The Amnesty Act of 1872 and the later 1898 Amnesty Act both apply only retroactively and do not protect President Trump here.

Arguments that President Trump in Colorado received below, and others will later receive, inadequate due process, if this Court rules for President Trump now, fail. Among other things, this is not a criminal trial but, rather, a civil matter, and quicker procedures were required, giving the upcoming national election. President Trump and his *Amici*, as well as the Anderson Respondents and their *Amici*, together with the Colorado courts and this Court, have spent untold hours, and untold dollars, extending over many months, to give him all the due process he deserves.

The Colorado Supreme Court correctly found that President Trump was an officer of the United States and

that he engaged in insurrection against the United States, supported by an ample evidentiary record.

This Court, in a different context, stated that a quotation in the flyleaf of a book from a famous author, philosopher, and satirist would not constitutionally redeem an otherwise obscene publication. By direct analogy, President Trump's heated rhetoric and false claims extending many weeks, from the time he first falsely alleged that the 2020 Presidential election had been stolen from him through the horrific events at the U.S. Capitol on January 6, 2021, drowned out, in number, volume and tenor, his few calls that day to act peacefully. Under the aforesaid precedent from this court, in a different context but applicable by analogy, this eviscerated any right he had to a free-speech defense under *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L. Ed. 2d 430 (1969).

ARGUMENT

I. THE RULING OF THE COLORADO SUPREME COURT BELOW SHOULD BE AFFIRMED

This Court should affirm the decision of the Colorado Supreme Court in *Anderson* for, among other things, the reasons stated in this *Amicus Brief*.

A. Section 3 of the Fourteenth Amendment to the Constitution bars from federal and state office persons, like President Trump, who swore an oath to support the Constitution and later violated it by insurrection against the country.

1. Section 3 of the Fourteenth Amendment is self-executing, as shown by its plain words and meaning

At trial, and on appeal to the Colorado Supreme Court in *Anderson*, President Trump argued that Section 3 of the Fourteenth Amendment is *not* self-executing. The majority opinion in *Anderson* stated that the justices in Colorado who joined that decision did *not* find "compelling" the ruling in *Griffin's Case* where, among other things, Chief Justice Chase of the United States Supreme Court held that Section 3 of the Fourteenth Amendment was *not* self-executing. On appeal, here, the President's *Petition for Cert.* at pg. 18 n. 30, referenced this exact legal question and said it is among "[t]he federal issues sought to be reviewed" in this Court.

President Trump's merits brief here, at pg. 39, claims that Section 3 cannot be enforced "[a]bsent congressional enforcement legislation under Section 5." And, at pg. 40, that "There are compelling reasons to follow the approach of *Griffin's Case and* regard the extant Congressional enforcement legislation as the exclusive means of enforcing Section 3…" (emph. added). *Amicus* disagrees.

Section 3 of the Fourteenth Amendment says:

> No Person *shall* be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, *shall* have engaged *in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.* But Congress *may by a vote* of two-thirds of each House, *remove* such disability. (emph. added).

The first sentence of Section 3 above opens with the phrase "No person shall…." The word "shall" is language of command and there is no reference in Section 3 to any pre-requisite action. Thus, Section 3 is self-executing and *automatically* acts to bar from holding the various federal and state offices named therein any person who: (i) earlier made an oath to support the Constitution of the United States and (ii) later broke that oath, by engaging in "insurrection" against the United States or by giving aid and comfort to its enemies.

The last sentence of Section 3 says that Congress may, by a 2/3 vote of both Houses, remove this disability. Obviously, "remove" can only reference a disability which, under the first sentence of Section 3, has already come into force.

The Justices of this Court, because the Constitutional language of Section 3 is clear on its face, should use judicial

restraint, as championed by Chief Justice John Roberts at the September 12, 2005 Senate Judiciary Committee hearing on his nomination to join the bench of this Court:

> Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them.[2]

2. In *Case of Davis* Chief Justice Chase of this Court, riding circuit in Virginia, ruled that Section 3 of Article 14 is self-executing, consistent with its plain meaning, in a split decision appealed to this Court then later mooted

In *Case of Davis*, the United States was, on a superseding Grand Jury Indictment of March 26, 1868, trying Jefferson Davis, former President of the Confederate States of America (the CSA), for treason against the United States. Before the war Davis, as a U.S. Senator from Mississippi, had taken an oath to defend the Constitution on December 8, 1845 in that capacity. *See* 7 F. Cas. at 90.

After the 14th Amendment was ratified on July 9, 1868, Davis and his lawyers used this affidavit, coupled with Section 3 of the Fourteenth Amendment, as the basis for a motion to quash his indictment. This defense was inspired, sometime after the Fourteenth Amendment came into effect. *See* 7 F. Cas. at 88:

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2. https://www.cnn.com/2005/POLITICS/09/12/roberts.state,ment/ (last viewed Jan. 16, 2024).

> As soon as this amendment [the 14th Amendment] was declared adopted…the counsel for Mr. Davis prepared to attack the prosecution pending against him on the grounds disclosed in the following proceedings, *which the reporter understands were inspired and suggested from the highest official source —not the president of the United States.* (emph. added)

Legal scholarship has since revealed that this "highest official source – not the President" was none other than Chief Justice Salmon P. Chase of the Supreme Court of the United States himself, riding circuit in Virginia and co-presiding over the trial. *See* Roy Franklin Nichols, *United States v. Jefferson Davis, 1865-1869*, 31 The American Historical Review No. 2 (Jan. 1926 pp. 266-294). Nichols writes, at pg. 282, that on Nov. 6, 1868, the general election of 1868 then over, Attorney General Evarts of the United States read to the President's Cabinet a letter from special counsel to the government Richard H. Dana, Jr., a prominent Boston lawyer, who recommended to Evarts that the treason charges be dropped. Dana reasoned the United States gained nothing by winning at trial that it had not already won on the battlefield. With risk that a sole juror in a hostile Virginia, not yet "readmitted" to the Union, could derail the prosecution, making the government look bad. Whereupon:

> Evarts gave this opinion his own endorsement and stated that in addition there was the usual difficulty: [Chief Justice] Chase, riding circuit, would not be able to [to] preside because the Supreme Court opened the week following the date set for the trial, and Evarts and Dana

were still unwilling to have the matter brought before [district judge] Underwood. In view of these circumstances the Attorney General recommended that the President issue a final proclamation and "close out the rebellion"; this would enable the district attorney to enter a *nolle prosequi* [later filed Feb. 15, 1869] and the case would be dropped….Seward and Welles were averse but the others, including [President] Johnson, seemed agreeable, and Evarts was assigned the duty of drawing up the necessary papers. The President, however, could not make up his mind to issue the proclamation, and when the cabinet meeting so broke up, Evarts wrote immediately to the new district attorney, S. Ferguson Beach, to postpone the [court] proceedings set for November 23 [1868[, until some time after, presumably, in March or April [1869]. He sent a copy of this letter to O'Conor [on Nov. 28, 1868].

O'Conor [chief counsel to Davis] decided to submit to delays no longer. He determined again to force action. He had learned from [George] Shea [another member of Davis' legal team] that in an interview between Chase and the latter [Shea] *the Chief Justice had given his opinion that the [new] Fourteenth Amendment prevented further proceedings. This enactment had disqualified from office-holding such men as Davis; Chase declared this disqualification to be a punishment for treason and, as no one might be punished twice for the same crime, all legal action to be forestalled thereby.* Taking

> advantage of his knowledge of this opinion, O'Conor undertook to move that the indictment be quashed….
>
> He informed Evarts and the district attorney of his intention. The Attorney General notified Dana to be in readiness to oppose this motion [footnotes discussing correspondence of Nov. 28 and 29, 1868.]

The date and particulars of the "interview" between Shea and the Chief Justice Chase are not stated by Nichols. It was clearly some time after July 9, 1868, when the Fourteenth Amendment first came into legal effect, maybe even close to the start of trial.

At trial on Dec. 3, 1865, 7 F.Cas. at 89-90, Davis's lawyers, at the request of the United States, filed a written statement to make the legal basis for his motion to quash the indictment clear for the record. Counsel to the United States prepared and filed a short response whereupon both statements were admitted of record. 7 F. Cas. at 90.

Thereafter, oral argument began before the two judges co-presiding over the trial under judicial rules then in effect: Chief Justice Chase, sitting as a trial judge of the circuit court for the district of Virginia and federal district judge John C. Underwood, as co-presiding trial judge.[3]

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3. Underwood, a New York politician of Tammany Hall and a known Abolitionist, helped found Virginia's fledgling Republican party. He later married a wife from Clarksburg VA (today West Va.) and was appointed to the federal bench for Virginia in 1864. Underwood was, allegedly, "[n]ot fitted for such office, because of

Robert Ould's argument for Davis, 7 F. Cas. at 90-91, followed the written statement which O'Conor, as lead counsel, had just filed. Ould claimed that Section 3 of the Fourteenth Amendment was self-executing. He argued that two recent Supreme Court cases which had struck down government efforts to bar former Confederates holding office who earlier signed loyalty oaths to the United State under President Andrew Johnson's post-war administration, *Ex Parte Garland*, 71 U.S. 333, 4 Wall. 333, 18 L. Ed. 366 (Dec. Term 1866) and *Cummings v. Missouri*, 71 U.S. 277, 4 Wall. 277 (Dec. Term 1866), both held that preventing persons subject to Section 3 of Article XIV from holding office was, effectively, a criminal penalty.

Therefore, Ould maintained, those who Section 3 of the Fourteenth Amendment automatically barred from office, like Davis, having taken an oath to defend the Constitution then broken it during the Civil War, had already suffered a criminal penalty. Accordingly, under long-recognized principles barring double jeopardy in the Fifth Amendment of the Constitution and under common law, Davis' indictment must be quashed.

Three attorneys argued for the government in reply. First, S. Ferguson Beach, 7 F. Cas. at 92, who said:

- Davis' claim that Section 3 of the Fourteenth Amendment had implicitly repealed the law

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his temperamental partisanship and his hatred of Virginians." [Attorney General of the United States] Speed knew this and realized that a trial before him was likely to be disgraced by partisan irregularities. *New York World*." Nichols, pg. 268 n.7.

under which the indictment had been framed was incorrect. Nowhere did section 3 say it repealed earlier laws of the United States or any other portion of the Constitution.

- If the court adopted the construction urged by Davis, this new statute would protect from prosecution only those senior Confederate leaders who had sworn an oath to defend the Constitution prior to the Civil War, then violated it during the war. That would leave rank and file Confederates still subject to prosecution on charges of treason against the United States even though they had only followed the directions of their more senior officers and government officials now free of that risk, if the court quashed Davis' indictment. An absurd legal result.

Gen. H. H. Wells, with the Office of the United States Attorney for the district of Virginia argued next, 7 F. Cas. at 92-94, that:

- The text of Section 3 of the Fourteenth Amendment used the words "engaged in insurrection" whereas Jefferson Davis had been charged in his grand jury indictment with "levying war." Because the two were not identical Section 3 of the Fourteenth Amendment did *not* serve to extinguish federal charges that Davis had engaged in treason against the United States.

- There was no "implied" repeal of the statute under which Davis had been charged because, again, "insurrection" was not "levying war."

Finally, Richard H. Dana argued for the United States, 7 F. Cas. at 94-96, that:

- Section 3 the Constitution does not use language of penal law, like "guilty" or "convicted," but speaks in terms of a civil "disability" which bars service in office. Moreover, the bar of Section 3 can be removed *by a political act*, the two-thirds vote of both Houses of Congress. Whereas, crimes can only be extinguished by *a pardon,* granted by *the chief executive of state,* either the President or a state governor.

- Neither *Ex Parte Garland* or *Cummings v. State of Missouri* said the penalty imposed by Section 3 of Article XIV was criminal.

- Disqualifications from office under Section 3 are akin to being barred from office due to age or foreign birth, neither being criminal in nature.

- The offense to which Section 3 of the 14th Amendment refers has two elements: (i) taking an oath to support the Constitution and (ii) a later breach of that oath, by engaging in rebellious acts. The oath and its holding, and its later breach, are the essence of the offense. Statutes against levying war have no reference to official duties and the indictment of Davis did not allege he had taken any oath of office.

Mr. Oury for Davis then argued in reply; 7 F. Cas. at 98-102.

After trial, the lwo judges were in disagreement about whether Section 3 of Article 14 was self-executing or not.

Chief Justice Chase held that Section 3 of the Fourteenth Amendment *is* self-executing. 7 F. Cas. 120. Moreover, Chase was of the opinion that Davis' indictment must be quashed to avoid double jeopardy. As to Judge Underwood, *Case of Davis* says only that he was of the opinion that Section 3 of the Fourteenth Amendment was *not* self-executing. 7 F. Cas. at 120. Given this split between the two judges, Davis' indictment was *not* quashed. Davis immediately took an appeal to the Supreme Court of the United States via a certificate of disagreement, for hearing at its next term. *Id.*

Davis' appeal to this Court was later mooted by a Christmas 1868 pardon of all Confederates from treason and the order in *United States v. Turner et. al.* (C.C.D. Va. Feb. 15, 1869) below:

> Monday, February 15, 1869
>
> United States
>
> Vs
>
> Thomas Turner…Wade Hampton…Robert E. Lee…James Longstreet…Jubal A. Early…and Jefferson Davis.
>
> The District Attorney, by leave of the Court, said that he will not prosecute further on behalf of the United States against the above named parties upon separate indictments for treason. It is, therefore, ordered by the Court that the prosecutions aforesaid be dismissed.[4]

4. *Amicus* omits all names in the caption. The full text is in John A. Richardson, *A Historical and Constitutional Defense*

3. Chief Judge Chase's later ruling in *Griffin's Case* that Section 3 of the Fourteenth Amendment is *not* self-executing, and can be enforced only by Congress, was erroneous. This ruling did not respect the plain words of Section 3 of Article XIV, nor cite, let alone distinguish, his earlier ruling to the contrary in *Case of Davis,* and evidenced improper judicial activism

Chief Justice Chase in *Griffin's Case*, again riding circuit, flip-flopped and now ruled there, contrary to his decision in *Case of Davis* just months before, that Section 3 is *not* self-executing. The Colorado Supreme Court held below that it did *not* find *Griffin's Case* "compelling." *Anderson*, ¶104, pg.59. However, the Colorado Supreme Court agreed with Chief Justice Chase, who decided the case that "[i]t must be ascertained what particular individuals *are* embraced by the definition." *Id.* This Court should reject *Griffin's Case* too.

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of The South (A.B. Caldwell, Atlanta, 1914, reprinted Sprinkle Publications, Harrisonburg VA 2010) at pp. 646-647. *See also Anon, Why Jefferson Davis Was Never Tried*, Richmond Times Dispatch February 19, 1911 page 3, at:

The times dispatch. [volume] (Richmond, Va.) 1903-1914, February 19, 1911, Image 3 "Chronicling America" Library of Congress (loc. gov,). Davis' advisors apparently met in a Richmond restaurant to discuss "[w]hether or not they should accept *a proposition made by the government* to have a 'nolles prosequi' entered *on the next day*. …" (emph. added). Davis' counsel saw litigation risk so consented on his behalf; Davis himself was out of town and could not be reached.

Griffin's Case was an appeal from an order of discharge from imprisonment made by the federal district judge in Richmond, upon a *writ of habeaus corpus* allowed upon the petition of Cassar Griffin. Griffin, a black man, had been convicted of attempted murder by a state court jury in September, 1868, in a trial conducted before Judge Hugh W. Sheffey of the Circuit Court of Rockbridge County, VA, who sentenced Griffin. On his way to the penitentiary, in the custody of the Sheriff, the writ was served whereupon the Sheriff brought him before Judge Underwood. It was set out in the petition for the writ that the judge fell within the class of persons disqualified from office under Section 3 of the Fourteenth Amendment.

Griffin argued, and Judge Underwood found, that Sheffey had been appointed as state court judge on February 22, 1866 by the federal military authorities then still governing Virginia after the Civil War. Earlier, in December 1849, Sheffey had taken an oath to support the Constitution as a member of Virginia's House of Delegates. Then violated it, Griffin claimed and the district court found, by serving in that body in 1862, during which time legislation was passed to support the Confederate cause. Therefore, Griffin asserted, all actions of Sheffey as Circuit Court judge, including the trial held before him and his sentence of Griffin to prison, were null and void.

Judge Underwood of the district court, flip-flopping from his position earlier in *Case of Davis*, and consistent with Chase's ruling there, held now that Section 3 of Article XIV *was* self-executing. Therefore, Judge Underwood directed Griffin's release. The Sheriff of Rockbridge County took an appeal to the full circuit court whereupon Chief Justice Chase, riding circuit, himself

flip-flopped from his earlier legal position in *Case of Davis* and, overturning Underwood, now ruled that Section 3 of Article XIV was *not* self-executing. So, the Chief Justice directed that Griffin be remanded to the custody of the Sheriff, for delivery to the penitentiary.

Chief Justice Chase, hearing the Sheriff's appeal, openly acknowledged that upon a "literal construction" of Section 3 of the Fourteenth Amendment the circuit court would have to affirm the district court's order discharging Griffin from custody. *See* Op. at *24:

> We come, then, to the question of construction. What was *the intention* of the people in adopting the Fourteenth Amendment. *What is the true scope and purpose of the prohibition to hold office contained in the third section?*
>
> …
>
> *The literal construction, therefore, is the only one upon which the order of the learned district judge, discharging the prisoner, can be sustained; and was, indeed, as appears from his [federal district judge Underwood's] certificate, the construction upon which the order [to release Griffin, granting the writ of habeus corpus] was made.* He [Underwood] says, expressly, "the right of the petitioner to his discharge appeared to me to rest solely on the incapacity of the said Hugh W. Sheffey to act (that is as judge) and so to sentence the prisoner under the fourteenth amendment.

> *Was this a correct construction?* In the examination of questions of this sort, great attention is properly paid to the argument from inconvenience. *This argument, if true, can not prevail over plain words or clear reason.* But, on the other hand, a construction, which must necessarily occasion great public and private mischief, must never be preferred to a construction which will occasion neither, or neither in so great degree, unless the terms of the instrument expressly require such preference. Let it then be considered what consequences would spring from the literal interpretation contended for in behalf of the petition.
>
> (emph. added).

With all respect to Chief Justice Chase, and that he was ruling in very challenging times, it seems clear, to *Amicus*, that he gave only lip service in *Case of Griffin* to the court's need to respect the "plain words" of Section 3 of the Fourteenth Amendment. Rather, in the language of his decision, both prior to and after his admission that the plain words of Section 3 should control, Chief Justice Chase employed "judicial gloss," adding words and asking questions not found in the plain words of Section 3 of Article XIV itself. This gloss, as *Amicus* sees it, came from Chief Justice Chase asking "intent," what the "true scope and purpose" of Section 3 was, whether the "literal construction" was, what Section 3's "true construction" or a "correct construction" were, and by Chase raising "the argument from inconvenience," none of which are found in or contemplated by the words of Section 3.

The Chief Justice's opinion moved on to discuss the fifth section of Article XIV. Contrary to his decision in *Case of Davis* that Section 3 was self-executing, Chief Justice Chase flip-flopped and, without citing, let alone distinguishing, his contrary earlier ruling in *Case of Davis.* now ruled directly to the contrary. Sections 3 and 5 of the Fourteenth Amendment, he said in *Griffin's Case*, together, showed that Section 3 requires Congressional legislation to implement it. Op. at *26 (emph. added):

> There are, indeed, other sections than the third, to the enforcement of which legislation is necessary; but there is no one which more clearly requires legislation in order to give effect to it. *The fifth section qualifies the third to the same extent as it would if the whole amendment consisted of these to sections. And the final clause of the third section itself is significant. It gives to congress absolute control of the whole operation of the amendment*. These are its words: "But congress may, by a vote of two-thirds of each house, remove such disability." Taking the third section, then, it seems to put beyond reasonable question the conclusion that the intention of the people of the United States, in adopting the fourteenth amendment, was to create a disability, to be removed in *proper cases* by a two-third vote, *and to be made operative in other cases by the legislation of congress in ordinary course.*

The italicized language above, "to be made operative in other cases…" is yet another example of the Chief Justice employing judicial gloss in *Griffin's Case*, nowhere found in the language of Section 3 itself.

In these "other cases," to be chosen by the judge sitting on the bench in the particular case, at his or her discretion, apparently, *Griffin's Case* being one, this ruling gave the udge leeway to choose to let the federal or state officials in question *remain* in office until such later date, if any, that Congress chose to remove them. In other words, the Chief Justice, by his judicial gloss about "other" cases, let himself (and any other judge) turn Section 3 on its head, if appropriate.

As to the fifth section of the Fourteenth Amendment, it says only that:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article.

Nowhere does this language say that "only" the Congress shall have enforcement rights. Nor does Section 5 say that Congress shall have "the" power to enforce Section 3. (In fact, as discussed later, state courts have enforced Section 3 of the Fourteenth Amendment for years, via their various state election and *quo warranto* laws.)

It is no surprise, given the discussion above, that Chief Justice Chase decided to leave Judge Sheffey of the Circuit Court of Rockbridge County (Va.) in place, together with the results of Mr. Griffin's trial before him as well. Griffin went to the penitentiary.

Respectfully, *Amicus* urges, to maintain public trust in our judicial system and our judges, unwarranted judicial activism of the sort that Chase employed in *Griffin's Case* must be avoided where, as here, the statory language is clear.

Indeed, the passage of new legislation is just what happened after *Case of Davis* and *Griffin's Case* were decided. The United States Congres first passed the Enforcement Act of 1870, aka the Civil Rights Act of 1870, aka the First Ku Klux Klan Act, 41st Congress Sess. 2, Ch. 114, 16 Stat. 140, enacted May 31, 1870, effective 1871, sections 14 and 15 of which (since repealed) directed federal prosecutors to seek a *writ of quo waranto* to remove from office persons who were disqualified under Section 3 of the Fourteenth Amendment. And imposed fines and jail time for holding office improperly.

Thereafter Congress passed the Amnesty Act of May 22, 1872, ch. 193, 17 Stat. 142 (1872), which eliminated the legal effects of Section 3 of the Fourteenth Amendment from almost all former Confederates, albeit Jefferson Davis was not among them. Davis would have to wait until Oct. 17, 1978, when President Carter signed P.L. 95-466, a resolution passed by both Houses of Congress by more than a two-thirds vote, which fully restoring his rights of U.S. citizenship, including the right to hold political office. Gen. Robert E. Lee received a similar restoration of civil rights in 1975.

Concluding, the Colorado Supreme Court had good cause when it found *Griffin's Case* not "compelling." This Court should reject *Griffin's Case* also.

4. This Court has held that Article 14 is self-executing

In the *Civil Rights Cases*, 109 U.S. 3, 11 (1883), this Court stated, expressly, that the Fourteenth Amendment is:

> [u]ndoubtedly self-executing without any ancillary legislation.

It makes no sense for this Court to now "carve-out" Section 3 of the Fourteenth Amendment and hold that it is not self-executing, as President Trump and some of his *Amici* urge. And, as Justice Samour of the Colorado Supreme Court would have done in *Anderson*. Samour Dissent at 16.

B. From the time of the Civil War until now States have enforced Section Three under their own laws so allowing

As noted in the discussion immediately preceding, there is nothing in Section 5 of the Fourteenth Amendment which says that "only" Congress can enforce Section 3. Nor which says that "the" right to enforce Section 3 of the Fourteenth Amendment rests in the Congress, alone.

Consistent therewith, immediately after the Fourteenth Amendment was passed, states and citizens thereof began to enforce it and continue to do so today, state law permitting. *See* e.g. *Worthy v. Barrett*, 63 N.C. 199 (1869), *app. dismissed sub. nom. Worthy v. The Commrs.*, 76 U.S. 611, 9 Wall. 611, 19 L. Ed. 2d 965 (1869).

More recently, *see e.g.* the Findings of Fact, Conclusions of Law and Judgment rendered in *State of New Mexico, ex. rel. Marco White, Mark Mitchell and Leslie Lakind v. Griffin* (1st. Jud. Dist. Ct. Santa Fe Sept. 6, 2022). There, a local county commissioner, Mr. Couy Griffin, was removed from office under New Mexico law after he was found guilty in federal court of trespassing for taking part in the January 6, 2021 attack at the U.S. Capitol.

New Mexico Law, Art. XX §1, requires "[e]very person whether elected or appointed to any office" to take an oath "[t]hat he will support the Constitution of the United States." Findings of Fact, ¶8. The petitioners, on behalf of the State of New Mexico, filed a Complaint on March 21, 2022, alleging that Griffin should be removed him from his office as District 2 Commissioner of the Otero County Board of Supervisors, in which capacity he had taken this oath. The petitioners sued under New Mexico's Quo Warranto statute, NMSA 1978, §44-3-4, claiming that Mr. Griffin, because his actions in Washington, D.C. at the U.S. Capitol on January 6, 2021, created a bar on his continuing in office under Section 3 of the Fourteenth Amendment. The Complaint sought also, in this regard, a judicial declaration that the January 6th attack and its surrounding events were an "insurrection" against the United States within the meaning of Section 3 of Article XIV.

Mr. Griffin removed the litigation to federal court but, as described in the final judgment of September 22, 2022, the case was remanded to state court for lack of jurisdiction. Ultimately, the relief sought by the Petitioners was granted, for the reasons more fully set forth in the final judgment.

Importantly, not all actions brought under similar state laws, coupled with Section 3 of the Fourteenth Amendment, are successful. *See*, *e.g.*, *Rowan v. Georgia Secretary of State Brad Rafensperger*, Case No. 2022 CV364778 (Fulton County Ga. Sup. Ct. July 25, 2022), *discretionary appeal denied*, Case No. S23D0071 (Ga. Sept.1, 2022). The opinion of the Fulton County (Ga.) Superior Court itself is available at:

2022-07-25-final-order.pdf (freespeechforpeople.org), last visited on Jan. 28, 2024.

In this litigation, the petitioners, five registered voters, all "electors" in Georgia's 14th Congressional district, *unsuccessfully* sought to bar U.S. Rep. Marjorie Taylor Greene's candidacy for re-election to that district under Georgia law, O.C.G.A. §21-2-5(b). Their suit, filed March 24, 2022, shortly after she announced her candidacy for re-election, claimed that Rep. Greene had violated Section 3 of the Fourteenth Amendment due to her actions surrounding the breach of the U.S. Capitol on January 6, 2021. Thereafter, on March 24, 2022, the Secretary of State referred the case to a State of Georgia administrative law judge (ALJ) for proposed findings of fact and conclusions of law.

Shortly thereafter, on March 31, 2022, Rep. Greene herself filed a lawsuit in federal district court. *Rowan v. Raffensperger in his official capacity as Georgia Sec. of State*, C.A. No. 1:22-cv-01294 (N.D. Ga). Count I argued that Georgia's state law challenge statute referenced above violated her First Amendment rights. Count II alleged a violation of her due process under the Fourteenth Amendment. In Count III, Rep. Greene sought a ruling in her favor under Art. 1, Section 5 U.S. Constitution. Finally, in Count IV, she argued that the Amnesty Act of May 22, 1872, ch. 193, 17 Stat. 142 (May 22, 1872), barred the litigation against her in state court.

A motion for a temporary restraining order was filed on April 1, 2022. Her motion for injunctive relief was thereafter *denied* by the federal district court, Amy Totenberg, J., a *magna cum laude* graduate of Harvard-

Radcliffe College who took her law degree from Harvard Law School, on July 25, 2022, DE No. 52. As part of that ruling, Judge Totenberg held, pp. 55-64, that both the Amnesty Act of 1872 and the later 1898 Amnesty Act apply only retroactively. (So, to the extent relevant, neither protect President Trump here either).

Rep. Greene's appeal to the Eleventh Circuit Court of Appeals from the federal district court's ruling was ultimately dismissed as moot. *Marjorie Taylor Greene v. Sec. of State for the State of Georgia Charles R. Beaudrot*, 57 F. 4th 907, 2022 WL 16641822 (11th Cir. Nov. 3, 2022)

Back in the state litigation, after a substantive hearing before the Georgia administrative law judge, after discovery squabbles, at which evidence was taken and testimony given, including testimony from Rep. Greene herself, the ALJ entered a decision in her favor, finding that there was insufficient evidence to demonstrate that Rep. Greene had participated in the invasion of the Capitol building or communicated with or directed other persons to do so. Mr. Raffensperger, Georgia's Secretary of State, adopted the ALJ's ruling as, pursuant to Georgia law, his being the final decision, subject to any later appeal.

Dissatisfied, the petitioners appealed the Secretary's decision to the Fulton County (Ga.) Superior Court. There, Superior Court Judge Christopher Brasher affirmed the Secretary of State's decision in the superior court's ruling of July 25, 2022. The petitioners sought a discretionary appeal to the Georgia Supreme Court which was denied.

C. Arguments that President Trump in Colorado received, and others later will receive, inadequate due process fail

In *Anderson*, ¶¶79-87, pp. 44-49, the Colorado Supreme Court held that President Trump received adequate due process from the Denver District Court in the §1-1-113 CRS (2023) election litigation. As, among other things, election related disputes, by their nature, are a type of civil litigation, not a criminal case and must move relatively quickly.

Justice Samour of the Colorado Supreme Court stated below that he found *Griffin's Case* "compelling." Samour Dissent at 8; *Anderson* ¶285. For the reasons stated herein earlier, *Amicus* respectfully disagrees.

Justice Samour's dissent in *Anderson* also vigorously complains that the trial in the Colorado District Court litigation, failed to give President Trump adequate due process. Samour dissent, *Anderson* ¶¶331-348, dissent pgs. 33-42. Among other things, he states that the litigation was a "procedural Frankenstein" created by stitching together "fragments" from two Colorado statutes and "remnants of traditional civil trial practice." Samour dissent at pg. 39, *Anderson* ¶339. He argues that the Section Three challenge brought by the Electors in Colorado "[w]as a square constitutional peg that could not be jammed into our Election Code's round hole," and that "[t]he district court forged ahead and improvised as it went along, changing statutory deadlines on the fly." *Id.*

Justice Samount goes on to say that the "unauthorized" statutory deadlines and procedures" took away the basic

proceedings that normally accompany civil trials, let alone criminal trials. He stated there had been "no basic discovery, no ability to subpoena documents and compel witnesses, no workable timeframes," and no jury trial afforded to President Trump. *Anderson*, ¶340-341, Samour dissent at pg. 39. All the foregoing translating to a lack of due process and an unfair trial for President Trump, his dissent states.

Surely, the trial in the Colorado district court was not perfect. Yet, President Trump raised multiple defenses, advanced by skilled counsel, and had an adequate opportunity to enter documents and testimony in evidence, and to object to the Anderson Respondents' own evidence. President Trump had the opportunity to testify also. Weighing all this, and the fact that civil political electoral litigation of the nature here is a civil proceeding, not a criminal proceeding, and by its nature must move relatively swiftly, Amicus states here that, all in all, this Court should affirm the Colorado Supreme Court and find that President Trump received adequate due process in the Colorado District Court.

D. The Colorado Supreme Court correctly found that President Trump was an officer of the United States

As to the claim of President Trump and his *Amici* that he was not an "officer of the United States," for purposes of applying Section 3 of the Fourteenth Amendment, Section 1 of Article II of the Constitution says:

> The *executive Power* shall be vested *in a President of the United States of America*. He

> shall hold his Office during the Term of four Years…

and the third paragraph of Article VI of the Constitution says:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and *all executive* and judicial *Officers*, both *of the United States* and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States

The President is the head of the Executive Branch of the federal government.

If relevant, modern legislators believe the President is an "officer of the United States." *See* 42 U.S.C. §9659(a)(2), part of CERCLA, allowing any person to file suit:

> [a]gainst *the President or any other officer of the United States…*

Given the foregoing, and common sense, it is inconceivable that the President, head of the Executive Branch of our government, is *not,* himself or herself, an "officer of the United States" for purposes of Section 3 of the Fourteenth Amendment. He or she is.

Amicus urges this Court to accept the legal reasoning set forth in *Motion System Corp. v. Bush*, 437 F.3d 1356,

1372 (Fed. Cir. 2006), Gajarsa, J., concurring in part, as the Colorado Supreme Court did in *Anderson*, at ¶145 pg. 30. *Amicus* also adopts the legal reasoning of the Anderson Respondents and all their *Amici* who, likewise, argue that President Trump was an "officer of the United States" for purpose of Section 3 of the Fourteenth Amendment.

E. The Colorado Supreme Court correctly found that President Trump engaged in insurrection against the United States

The Colorado Supreme Court in *Anderson* ruled, ¶¶176 – 225, pgs. 96-116, that President Trump engaged in "insurrection against the United States" within the meaning of Section 3 of the Fourteenth Amendment. *Amicus* agrees.

For reasons of space, *Amicus* will not add to the legal argument on this point made by the Anderson Respondents and their supporting *Amici*. Other than to say that, having watched the entire horrible, shocking and tragic events of January 6, 2021 live, as many Americans did that day, *Amicus* finds it inconceivable that this Court would not itself find that President Trump engaged in insurrection against the United States by virtue of his conduct. *As an American, Amicus takes no joy, whatsoever, in so stating.* Sadly, the events of that day were a national tragedy, at many levels, not the least of which is that many police officers died or were injured as a result, in whole or in part, directly or indirectly, due to the events which happened at the U.S. Capitol that day.

F. Jurisprudence from this Court shows clearly, by direct analogy, that President Trump's *Brandenburg* defense fails

The Colorado District Court found, and the Colorado Supreme Court affirmed in *Anderson,* ¶¶226 – 255, pgs. 116-132, that President Trump's First Amendment free speech defense under *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) failed. *Amicus* submits that this was the proper legal analysis and that President Trump's arguments to the contrary cannot be accepted by this Court either.

The evidence introduced at trial showed that President Trump unquestionably engaged in a great volume of *heated* rhetoric extending over many months, principally after Election Day, November 3, 2020, up to and on January 6, 2021, claiming that the 2020 Presidential election had, allegedly, been stolen from him. When that was not the case. Even after Attorney General William Barr, his lawyers in the Office of White House Counsel, government officials charged with maintaining election security, and experts hired by the Trump campaign and/or other Republican-affiliated entities after the 2020 election to find fraud in the election results post-election, among others, all told him that he had lost the election, legitimately. And after sixty or so court cases all produced no proof of any voting fraud which would have swung the election in his favor. It is staggering, and hugely concerning for our country, in the face of all this, and President Trump's calls to Georgia officials and the fake elector scandals, that many of his supporters, still claim, incorrectly, that the 2020 Presidential election was stolen.

President Trump directed his supporters to come to Washington D.C. on January 6th, promising that it would be "wild." The record also shows that his speech on the Ellipse on January 6th was filled with fiery, heated, untrue rhetoric about a stolen election, the need for his supporters to "fight like hell," that the Vice President needed to have (then lacked) courage, etc.

In short, as *Amicus* views the evidence, the volume, tenor and tone of President Trump's heated rhetoric, extending from soon after the election into January 6th itself, simply "drowned out" the smattering of, and rather fewer, requests from the President for his supporters to demonstrate peacefully that day.

For these reasons, the Colorado Supreme Court ruled in *Anderson*, Op. at ¶244, pgs. 127-128, citing *Thompson v. Trump*, 590 F. Supp. 3d 46, 113-114 (D. D.C. 2022), that isolated references of President on January 6th in urging his supporters to "peacefully and patriotically" make their voices heard, did not provide him with a First Amendment free speech defense under *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

In fact, there is clear authority from this Court for this very point, albeit in a different context. This was the exact ruling of this Court, in the context of obscenity, in *Kois v. Wisconsin*, 408 U.S. 229, 231, 92 S. Ct. 2245, 2246, 33 L. Ed. 2d 312 (1972) where this Court aptly stated:

> A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication.

See also United States v. Freeman, 761 F.2d 549, 551 (9th Cir. 1985), *cert. denied*, 476 U.S. 1120, 106 S.Ct. 1982, 90 L. Ed. 2d 664 (1986), holding:

> [T]he First Amendment is quite irrelevant if the intent of the actor and the objective meaning of the words *used are so close in time and purpose to a substantive evil as to become part of the ultimate crime itself. In those instances, where speech becomes an integral part of the crime, a First Amendment defense is foreclosed.*

CONCLUSION

For all the foregoing reasons, this Court should AFFIRM the ruling of the Colorado Supreme Court.

Respectfully submitted,

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